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Heard on the Hill

Senate Considers Role of Federal Trade Commission in Protecting Consumers

The Senate Committee on Commerce, Science, and Transportation ("Committee") has begun to consider the role of the Federal Trade Commission ("FTC" or "Commission") in protecting consumers with a particular focus on financial services and products. The full Committee held its first hearing on this topic on February 4, 2010, at which FTC Chairman Jon Leibowitz served as the sole witness and asked for additional tools, including civil penalty authority, Administrative Procedure Act ("APA") rulemaking authority for trade regulation rules, and authority to pursue aiders and abettors. On March 17, 2010, the Senate Commerce Subcommittee on Consumer Protection, Product Safety, and Insurance followed up with another hearing on this topic chaired by Subcommittee Chairman Mark Pryor (D-AR). These hearings are part of a larger ongoing debate as the Committee prepares to introduce legislation to reauthorize the Commission. The House included language to expand the authority of

the Commission as part of the omnibus financial reform bill, H.R. 4173, the Wall Street Reform and Consumer Protection Act that passed the House in December 2009. The Senate Commerce Committee has now been considering FTC reauthorization and is expected to introduce such legislation that may, at a later date, be married on the Senate floor with Senate Banking Committee Chairman Christopher Dodd's (D-CT) Restoring American Financial Stability Act.

At the hearing, Subcommittee Chairman Pryor stated that legislation must preserve the Commission's consumer protection mission and underscored the need to ensure that new legislation does not create regulatory gaps. Echoing FTC Chairman Leibowitz's testimony from the first hearing, FTC Commissioner J. Thomas Rosch, as well as witnesses from the consumer and academic communities, expressed support for granting the Commission APA rulemaking authority. Subcommittee Ranking Member Roger Wicker (R-MS) cautioned against removing the current safeguards imposed on FTC rulemaking and urged further consideration of the ramifications of repealing such safeguards. Industry representatives, in addition to former FTC Chairman Timothy Muris, also recommended maintaining current rulemaking procedures.

Congress Considers Internet Control by China

Through various committees, initiatives, and caucuses, members of Congress have explored, and continue to explore, the issues that arise when conducting business in countries that censor the Internet and how best to advance privacy and free expression globally. Most recently, on March 24, 2010, Senators Ted Kaufman (D-DE) and Sam Brownback (R-KS) announced the establishment of a new Senate Global Internet Freedom Caucus ("Caucus"), formed to highlight the importance of a free global Internet. Citing China as an example of an authoritarian government that censors information, Caucus Co-Chair Brownback stated that the Caucus would stand against digital tyranny that violates human rights.

That same day, the Congressional-Executive Commission on China held a hearing chaired by Senator Byron Dorgan (D-ND) on Internet control in China to explore the nexus between human rights and trade. Witnesses at the hearing discussed the challenges posed by China's regulation of the Internet to conducting business in the country.

Earlier in the month, on March 2, 2010, the Senate Judiciary Committee's Subcommittee on Human Rights and the Rule of Law also held a hearing on efforts by foreign governments to censor Internet sites and citizen communications. The hearing focused on a multi-stakeholder voluntary initiative established by industry and nongovernmental organizations to address issues pertaining to human rights, censorship, and user privacy in Internet technologies. At the hearing, Subcommittee Chairman Dick Durbin (D-IL) expressed an interest in introducing legislation to require Internet companies to take reasonable steps to protect human rights.

Around the Agencies

Federal Communications Commission's National Broadband Plan Offers Privacy Recommendations

On March 16, 2010, the Federal Communications Commission ("FCC") issued its long-awaited report to Congress on expanding broadband Internet access in the United States.¹ Among a host of other topics, the National Broadband Plan ("Plan") addresses privacy issues in the context of online application development and use.

I. Overview of the Plan

The introductory chapters of the Plan review the FCC's goals in issuing the Plan and the current state of the broadband ecosystem. Next, the chapters in the Plan's first major section discuss recommendations to spur competition as a way of fostering investment and innovation. These recommendations span innovation policy, research and development, spectrum, and infrastructure. The Plan's second section, on inclusion, addresses how to expand broadband access to interested customers and barriers to such expansion. The final section of the Plan sets out the FCC's views and recommendations in specific policy areas: health care, education, energy and the environment, economic opportunity, government performance, civic engagement, and public safety. This section closes with a chapter on implementation and progress benchmarks.

II. Privacy Recommendations

The FCC's privacy recommendations appear in the Plan's fourth chapter on "Broadband Competition and Innovation Policy," in a subsection focusing on online applications. The FCC takes up privacy issues here on the ground that "[t]he collection, aggregation, and analysis of personal information are common threads among, and enablers of, many application related innovations."² The FCC's Plan acknowledges the consumer benefits of the use of personal information as a driver of Internet innovation. In particular, the Plan discusses the uses of data to target relevant advertising, customize services, and lower the cost to consumers of applications and content. However, the FCC also suggests that the growing importance of data may hinder competition by disadvantaging firms that have not aggregated as much consumer data.

The FCC offers several specific recommendations that address online data collection and usage issues, including comments directed at Congress, the Federal Trade Commission ("FTC"), and other federal agencies. These recommendations are as follows:

- Recommendation 4.14: Congress, the FTC, and the FCC should consider clarifying the relationship between users and their online profiles.

¹ Federal Communications Commission, *Connecting America: The National Broadband Plan* (March 16, 2010), available at www.broadband.gov.

² *Id.* at 52.

In connection with this recommendation, the FCC poses several questions:

- What obligations do firms that collect, analyze, or monetize personal data or create digital profiles of individuals have to consumers in terms of data sharing, collection, storage, safeguarding, and accountability?
 - What, if any, new obligations should firms have to transparently disclose their use of, access to, and retention of personal data?
 - How can informed consent principles be applied to personal data usage and disclosures?
- Recommendation 4.15: Congress should consider helping spur development of trusted “identity providers” to assist consumers in managing their data in a manner that maximizes the privacy and security of the information.
 - Recommendation 4.16: The FCC and FTC should jointly develop principles to require that customers provide informed consent before broadband service providers share certain types of information with third parties.
 - Recommendation 4.17: The federal government, led by the FTC, should put additional resources into combating identity theft and fraud, and help consumers access and utilize those resources, including bolstering existing solutions such as OnGuard Online.

Specifically, the FCC recommends that the government:

- Put more resources into OnGuard Online;
 - Maintain and publicize a database of agencies with responsibility for identity theft and fraud information;
 - Continue education efforts around identity theft and fraud; and
 - Encourage broadband service providers to link to OnGuard Online.
- Recommendation 4.18: FCC consumer online security efforts should support broader national online security policy, and should be coordinated with the Department of Homeland Security, the FTC, the White House Cyber Office and other agencies. Federal agencies should connect their existing websites to OnGuard Online to provide clear consumer online security information and direction.
 - Recommendation 4.19: The federal government should create an interagency working group to coordinate child online safety and literacy work, facilitate information sharing, ensure consistent messaging and outreach, and evaluate the effectiveness of governmental efforts. The working group should consider launching a national education and outreach campaign involving governments, schools and caregivers.
 - Recommendation 4.20: The federal government should investigate establishing a national framework for digital goods and services taxation.

Federal Trade Commission Concludes “Exploring Privacy” Roundtable Series

The Federal Trade Commission (“FTC”) convened the third and final roundtable in its “Exploring Privacy” series on March 17, 2010 in Washington, DC. The FTC plans to build on the roundtable proceedings to issue a report on privacy issues as early as this summer, and will solicit public comments and responses to this report.

The first roundtable featured panels on the risks and benefits of data practices, consumer expectations and disclosures, online behavioral advertising, information brokers, and existing regulatory frameworks. The second roundtable focused on the benefits and risks created by technology and the privacy considerations associated with social networking, cloud computing, and mobile marketing.

In the third roundtable, the FTC included a panel on privacy and Internet architecture and panels on health and other sensitive consumer information. The series closed with a final panel discussing lessons from the roundtable series and possible paths forward. David Vladeck, the head of the FTC’s Consumer Protection Bureau, opened the event by identifying four themes from the prior roundtables: (1) technology carries both risks and benefits; (2) new business models raise privacy challenges; (3) technological tools can help to protect privacy; and (4) there is agreement that information should be transparent, but further exploration is needed on how this can best be accomplished.

The first panel focused on how Internet design or architecture could be improved to address privacy and security challenges. Panelists discussed the difficulties of building privacy into today’s Internet and raised possible solutions, including the use of identity management services. The second panel discussed health information privacy issues such as how health data should be treated outside the traditional health care context and the need for socially beneficial uses of such data. The third panel of the day explored the treatment of “sensitive” information. The panel examined challenges to defining sensitive data and discussed whether such data should be subject to restrictions. During the final panel, speakers were invited to focus on lessons learned from the roundtables about commercial data practices, and addressed a variety of issues including the roles of consumer notice, choice, and data access, and whether the distinction between personally identifiable information (“PII”) and non-PII has blurred.

The event ended with remarks by Jessica Rich, Deputy Director of the FTC’s Bureau of Consumer Protection. Ms. Rich commented that the roundtables have shown that the dominant privacy models have not kept pace with the business models that have been evolving. She identified several issues for consideration, including: (1) how to offer consumers greater control, recognizing that they do not want to review privacy policies; (2) how to treat privacy concerns that vary across individuals; (3) how to protect privacy without stifling innovation; (4) how to accommodate existing and future business models, including models pertaining to online behavioral advertising

and location-based services; and (5) how to produce a relatively simple framework built on current privacy models and privacy work already underway.

Federal Trade Commission Announces Review of COPPA Rule

On March 24, 2010, the Federal Trade Commission (“Commission”) announced that it was commencing a review of the Children’s Online Privacy Protection Rule (“COPPA Rule”), which implements the Children’s Online Privacy Protection Act (“COPPA”). The COPPA Rule applies to operators of commercial web sites and online services directed to children under age 13 that collect, use, or disclose personal information from children, and operators of general audience web sites that have actual knowledge that they are collecting, using, or disclosing personal information from children under the age of 13. The COPPA Rule seeks to provide parents with tools to control how information about their children is collected online by requiring operators of covered sites to: (1) provide notice of information practices; (2) acquire verifiable parental consent (with limited exceptions) before collecting personal information from children; (3) give parents choice to limit the disclosure of personal information to third parties; (4) provide parents with access to their children’s personal information and the ability to delete such information; (5) provide parents with the ability to withdraw consent; and (6) maintain the confidentiality, security, and integrity of collected personal information.

At least once every ten years, the Commission conducts a review of its regulations to determine whether they should be retained or modified. Previously, the Commission conducted a voluntary review of the COPPA Rule in 2001 and a statutorily mandated review in 2005, retaining the Rule without change after the most recent review. The Commission explained that another review of the COPPA Rule is warranted at this time because a change has occurred in how people access the Internet, particularly through the use of mobile technology.

The current review marks a more expansive review of the COPPA Rule by the Commission. In addition to seeking comment on the traditional questions of whether the COPPA Rule should be retained or modified, the Commission has also asked numerous questions about whether the COPPA Rule should apply across broader platforms and to more kinds of information. Comments are due June 30, 2010. On June 2, 2010, the Commission will host a workshop as part of its COPPA Rule review.

Federal Reserve Board Issues Final Gift Card Rule

The Federal Reserve Board (“Board”) has issued its final rule (“Rule”) implementing the gift card provisions of the Credit Card Accountability, Responsibility and Disclosures Act (“Act”), which was signed into law by President Obama on May 22, 2009. The Rule, which applies to general-use prepaid cards, gift certificates, store gift cards (collectively hereinafter “gift cards”), and loyalty, award, or promotional gift cards, will become effective, prospectively, beginning August 22, 2010. Commentary to the Rule explains that the Rule was intended to provide consumers with clear and conspicuous disclosures so that they will not be caught off guard by unexpected

fees or expiration dates. The many state laws governing gift cards remain in effect, and the Rule only preempts those laws to the extent that the laws are inconsistent with the Act and the Rule. While the Rule primarily focuses on disclosure, fee, and expiration requirements imposed on various gift cards, the Rule also includes specific disclosure requirements for loyalty, award, or promotional gift cards.

I. Gift Cards

The majority of the Rule applies to gift cards. Specifically, the Rule prohibits imposing dormancy fees, inactivity charges or fees, or service fees on such gift cards unless: (1) the card has been inactive for at least one year; (2) no more than one fee is charged per month; and (3) the consumer is provided with specific disclosures about the fees (e.g., the fee amount, how often the fee may be assessed, and that a fee may not be imposed more than once per month). Additionally, the Rule provides that a gift card may not expire earlier than five years from the date it was issued or five years from the date that funds were last loaded, and the expiration date must be clearly disclosed on the card.

II. Loyalty, Award, or Promotional Gift Cards

The Board has defined the term “loyalty, award, or promotional gift card” to mean “a card, code, or other device that is issued on a prepaid basis primarily for personal, family, or household purposes to a consumer in connection with a loyalty, award, or promotional program, is redeemable upon presentation at one or more merchants for goods or services, or usable at automated teller machines,” and that includes specified disclosures. While such cards are exempt from the expiration limitations and other requirements imposed on gift cards, the Rule outlines specific disclosures for the loyalty, award, and promotional cards. Required clear and conspicuous disclosures for such cards include: (1) disclosing on the front of the card that it is a loyalty card; (2) including the expiration date of underlying funds on the front of the card; (3) indicating any fees on or with the card; and (4) providing on the card a toll-free number and website if one is maintained so consumers may access fee information.

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